

33904

**IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA**

LAURIE ANN MURPHY and  
SHAWN M. MURPHY, SR.,  
individually and as parents  
and natural guardians of  
SHAWN M. MURPHY, JR., a minor,

Plaintiffs,

v.

CASE NO. 04-C-444

LAURA MILLER, D.O.; JOHN BATTAGLINO,  
JR., M.D.; DENNIS L. BURECH, M.D.;  
WHEELING HOSPITAL, INC.; and  
WEST VIRGINIA BOARD OF GOVERNORS,

Defendants.

**MEMORANDUM OF OPINION AND ORDER**

Now pending before the Court are Plaintiff's Motion for New Trial/Post-Trial Relief and Plaintiff's Renewed Motion for Costs. These post-trial motions have been timely filed following a trial by jury with respect to the Plaintiffs' claims against Defendants Dennis Burech, M.D., and West Virginia Board of Governors, in which a verdict was returned in favor of the Defendants. A settlement was previously reached with respect to the Plaintiffs' claims against Defendants Laura Miller, D.O., John Battaglino, Jr., M.D., and Wheeling Hospital, Inc. Having reviewed the parties' respective motions and memoranda, and having given each of the parties an opportunity for oral argument during a hearing held on May 7, 2007, the Court is now prepared to issue its decision.

**I.**  
**PLAINTIFFS' MOTION FOR NEW TRIAL/POST-TRIAL RELIEF**

The law that guides the Court's consideration of a motion for new trial is embodied in Rule 59 of the West Virginia Rules of Civil Procedure, which states in pertinent part:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law.

W.V.R.C.P. 59(a)(1)(in part) (2007). In interpretation of this Rule, the West Virginia Supreme Court of Appeals has explained:

A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Syl. pt. 3, In re State Pub. Bldg. Asbestos Litig., 193 W.Va. 119, 454 S.E.2d 413 (1994). Rule 59 motions require the trial court to consider the sufficiency of the evidence presented during the trial:

When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.

Syl. pt. 5, Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999), *quoting* Syl. pt.

4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958).

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. pt. 7, Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999), *quoting* Syl. pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

Additionally, while not in syllabus, Justice Cleckley provided further direction for a trial court in considering a Rule 59 motion for new trial:

The lower court must always temper the decision whether to grant a new trial because of trial error by considering the importance to the litigants of receiving a fair and final judgment with society's interest, as expressed through our Legislature, that unless error affected the outcome of the trial a new trial should not usually be granted.

Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995).

The Court has carefully considered each of the issues raised in the Plaintiffs' Motion for New Trial/Post-Trial Relief in light of the above standard and accordingly hereby

**ORDERS** that Plaintiffs' Motion for New Trial/Post-Trial Relief is **DENIED**.

**II.**  
**PLAINTIFFS' RENEWED MOTION FOR COSTS**

The Plaintiffs have renewed their Motion for Costs seeking the Court to order counsel for Dr. Burech to pay the deposition cancellation fee of \$2500.00 charged by Dr. Balducci. Following a hearing on the Plaintiffs' original motion, the Court requested additional documentation from Dr. Balducci indicating that he lost time from work as a result of the cancellation. The Court has now been advised that no such documentation exists. Instead, the fee represents Dr. Balducci's standard fee for scheduling a half day off of work. Absent evidence of actual lost time from work, the Court is not inclined to shift the cost of the cancelled deposition to counsel for Dr. Burech under these circumstances. In particular, counsel for Dr. Burech did not notice the deposition; additionally, the cancellation came about because of the Plaintiffs' settlement with several defendants, and it was unknown at that time whether Dr. Balducci would be involved in the case against the non-settling defendants, as his opinions appeared to be directed primarily, if not exclusively, toward the settling group of defendants.

It is hereby

**ORDERED** that the Plaintiffs' Renewed Motion for Costs is **DENIED**.

All exceptions and objections are noted and preserved.

It is further


**ORDERED** that the Circuit Clerk provide attested copies of this order upon entry to Harry S. Cohen, Esq. and Douglas L. Price, Esq., HARRY S. COHEN & ASSOCIATES, P.C., Two Chatham Center, Suite 985, Pittsburgh PA 15219; D.C. Offutt and Cheryl A. Simpson, Esq., OFFUTT FISHER & NORD, 812 Quarrier Street, Suite 600, PO Box 2833, Charleston WV 25330-2833 and James C. Wright, Esq., STEPTOE & JOHNSON, PLLC, 1233 Main Street, Suite 3000, PO Box 751, Wheeling WV 26003.

**ENTERED** this 11<sup>th</sup> day of May, 2007.



**JAMES P. MAZZONE, JUDGE**

A copy, Teste:



**Brenda L. Miller**  
Circuit Clerk

**CERTIFICATE OF SERVICE**

I, Douglas L. Price, Esquire, hereby certify on the 30<sup>th</sup> day of October 30, 2007, a true and correct copy of the Plaintiffs' Petition for Appeal was sent by first class mail to the following:

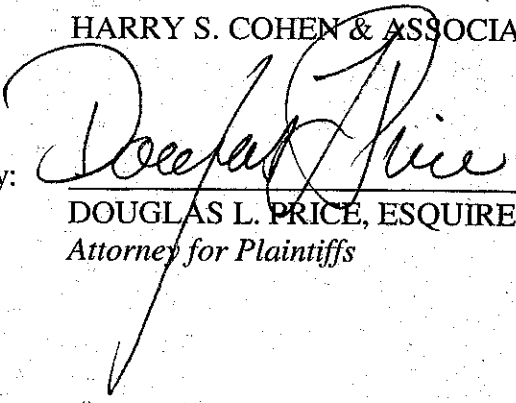
**Brenda Miller, Clerk of Courts**  
Circuit Court of Ohio County  
1500 Chapline Street  
Room 403  
Wheeling, WV 26003

**Cheryl A. Simpson, Esquire**  
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Wheeling, WC 26003-0751  
(Counsel for Defendant West Virginia University Board of Governors)

HARRY S. COHEN & ASSOCIATES, PC

By:

  
DOUGLAS L. PRICE, ESQUIRE  
Attorney for Plaintiffs